ROHASASSETS SDN BHD v. WEATHERFORD (M) SDN BHD & ANOR

COURT OF APPEAL, PUTRAJAYA
ROHANA YUSOF PCA
VERNON ONG LAM KIAT JCA
AB KARIM AB JALIL JCA
[CIVIL APPEALS NO: W-02(NCVC)(W)-130-01-2016
& W-02(NCVC)(W)-661-04-2016]
11 JUNE 2019

LANDLORD AND TENANT: *Tenancy – Termination – Claim for double rent premised on 'holding over' – Whether tenants' holding over in breach of tenancy agreements – Whether discretion to impose double rental vested with courts – Requirement of wilfulness or contumacious holding over – Whether prerequisite for imposition of double rental – Whether holding over clauses in tenancy agreement premised on s. 28(4)(a) of Civil Law Act 1956 – Whether wilful or contumacious holding over established by landlord – Whether claim for double rent ought to be allowed*

The appellant ('Perkasa') was the landlord of a commercial building. The first respondent, ('first defendant') occupied portions of the 11th and 12th floors of the building, which tenancy expired on 30 April 2009 and 31 March 2009 respectively. The tenancy of the 14th floor, occupied by the second respondent ('second defendant'), expired on 31 March 2011. The 12th floor was originally tenanted by the second defendant under a tenancy agreement. The second defendant with Perkasa's consent vacated the 12th floor on 1 February 2008 after which the first defendant took over the premises in April 2008. The parties were, at all material times, involved in negotiations for fresh tenancies of their respective tenancies which commenced on or before January 2009. When the negotiations failed, Perkasa, *vide* letters dated 19 August 2011, gave the defendants notices to terminate the 11th, 12th and 14th floor tenancies and to quit and deliver vacant possession on 1 October 2011. The defendants, although agreed to the termination of the tenancies, sought a fair and reasonable period to quit and deliver vacant possession of the premises to Perkasa. Hence, the defendants delivered vacant possession of the premises on 31 October 2011. Perkasa therefore claimed for double rental against the first and second defendants premised on two causes of action: (i) that the defendants were holding over the premises pursuant to s. 28(4)(a) of the Civil Law Act 1956 ('CLA'), and/or (ii) that the defendants were holding over in breach of the 'holding over' clauses under the tenancy agreements. Perkasa also claimed for exemplary damages, loss of income, interest and costs. The first defendant counterclaimed for the refund of the deposits paid for the 11th and 12th floor tenancies respectively, whilst the

second defendant's counterclaim was for the refund of the deposit paid for the 14th floor tenancy. The High Court dismissed Perkasa's claims against the first and second defendants and allowed the first and second defendants' counterclaims for the refund of the deposits on the grounds, *inter alia*, that (i) the second defendant's contractual rights and obligations under the 12th floor tenancy agreement was extinguished and discharged when the second defendant vacated the 12th floor premises with Perkasa's consent; (ii) Perkasa had, after the expiry of the 11th, 12th and 14th floor tenancy agreements and prior to the issuance of the letters dated 19 August 2011, consented to the defendants continuing to occupy and remain in possession of the said floors, pending negotiations between the parties for fresh tenancies to be agreed; (iii) there was no evidence to support the allegation that the holding over of the 11th, 12th and 14th floors was wilful or contumacious within the requirements of s. 28(4)(a) of the CLA; (iv) the parties had intended for the defendants to stay on the premises pending conclusion of negotiations on the terms of the new tenancies, with no suggestions that the defendants were expected to vacate the premises on the expiry of the tenancies. Hence, these appeals by Perkasa *ie*, (i) Appeal No. 130 against the decision dismissing Perkasa's claim and allowing the first defendant's counterclaim; and (ii) Appeal No. 661 against the decision allowing the second defendant's counterclaim. The principle issues to be determined in this appeal were: (i) whether s. 28(4)(a) of the CLA confers a discretion on the court in deciding whether to impose double rental and if so, whether there is a requirement in law to prove contumacious or wilful holding over on the part of the tenant in order for the landlord to recover double rental; (ii) whether the 'holding over' clauses under the tenancy agreements did not require 'wilful neglect or refusal to yield up the premises' before a claim for double rental could be made for holding over; (iii) whether the defendants were holding over the premises wilfully or contumaciously; (iv) whether the notices to quit issued by Perkasa to the defendants were reasonable and valid; and (v) whether the defendants' counterclaim for the refund of the deposits should be allowed.

Held (allowing Appeal No 130 in part; dismissing Appeal No 661)
Per Vernon Ong Lam Kiat JCA delivering the judgment of the court:

(1) Perkasa's argument, that the requirement of wilfulness or contumacy imposed by the Federal Court in *Krishna Sreedhara Panicka v. Chiam Soh Yong Realty Co Ltd* ('*Krishna Sreedhara Panicka*') was no longer applicable in light of the Federal Court's decision in *Wee Tiang Yap v. Chan Chan Brothers* ('*Wee Tiang Yap*'), was without merit. The pronouncements of the majority of the Federal Court in *Krishna Sreedhara Panicka* were consistently adhered to in *Wee Tiang Yap*. In fact, soon after *Wee Tiang Yap* was decided, the Federal Court in *Soong Ah Chow & Anor v. Lai Kok*

Cheng ('*Soong Ah Chow*') referred to and applied the majority judgment in *Krishna Sreedhara Panicka*. Even if there was a conflict in the decisions of the Federal Court in *Krishna Sreedhara Panicka* and *Wee Tiang Yap*, it was clear that the Federal Court in *Soong Ah Chow* applied and followed the majority judgment in *Krishna Sreedhara Panicka*. This court was bound to apply the later Federal Court decision in *Soong Ah Chow*. (para 11)

(2) Section 28(4)(a) of the CLA, being a penal provision, must necessarily be construed with some degree of stricture; such that the courts must be vested with some discretion when to impose double rental. It is a requirement under s. 28(4)(a) of the CLA that there must be a wilful or contumacious holding over on the part of the tenant in order for the landlord to claim double rental. (para 12)

(3) The 'holding over' clauses related to: (i) the tenant holding over after the expiry of the tenancy; and (ii) the agreed liquidated damages which was computed on the basis of double rental. Seen in this light, the context and legal background for the 'holding over' clauses were premised on s. 28(4)(a) of the CLA, and in particular, the analogous remedy of double rental for holding over a tenancy. The legal background against which the tenancy agreement was made may influence the interpretation of the tenancy agreement, in particular, the 'holding over' clauses. As such, the principles on the interpretation of s. 28(4)(a) of the CLA would also apply to the interpretation of the 'holding over' clauses. It followed that the requirement to show wilful or contumacious holding over by the defendant must be proved to enable Perkasa to claim for double rental for holding over. (para 14)

(4) The requirement for the trial judge to have made a decision which was 'plainly wrong' before an appellate court may intervene is well settled. The trial judge had carefully considered the totality of the evidence and arrived at his findings on the basis of his evaluation of the relevant evidence. He had given his reasons for his findings and for rejecting Perkasa's interpretation of the facts. There was no misdirection on the evidence. The court did not find the trial judge's findings of fact were plainly wrong. Accordingly, the learned judge's finding that there was no evidence to prove wilful or contumacious holding over by the defendants was affirmed. (paras 16 & 19)

(5) After the expiry of the fixed term of the respective tenancies, the defendants became in law and in fact, monthly tenants of the premises they occupied. The notices to quit were not unreasonable. As such, the court allowed Perkasa's claim for double rental in respect of the 11th, 12th and 14th floors calculated from the period commencing immediately after the expiry of the notices to quit up to the date of the delivery of vacant possession of the premises by the defendants. (para 20)

Case(s) referred to:

Aseambankers Malaysia Bhd & Ors v. Shencourt Sdn Bhd & Anor [2014] 2 CLJ 773 CA ***(refd)***

Basnol Abol & Ors v. The State Government of Sarawak & Other Appeals [2004] 2 CLJ 553 FC ***(refd)***

BCCI v. Ali [2002] 1 AC 251 ***(refd)***

Dalip Bhagwan Singh v. PP [1997] 4 CLJ 645 FC ***(refd)***

Eight Development (M) Sdn Bhd v. Antara Steel Mills Sdn Bhd [2004] 2 CLJ 32 CA ***(refd)***

Housing and Development Board v. Lee Sem Yoong Sdn Bhd [1987] 1 LNS 30 SC ***(refd)***

HSBC Bank (M) Bhd v. Wui Ling Timber (Bintulu) Sdn Bhd & Anor [2000] 8 CLJ 197 HC ***(refd)***

Interfoto Picture Library Ltd v. Stiletto Visual Programmes Ltd [1989] QB 433 ***(refd)***

JR Lincks Educational Consultants Sdn Bhd v. Goh & Sons Enterprises Sdn Bhd [2008] 3 CLJ 815 CA ***(refd)***

Krishna Sreedhara Panicka v. Chiam Soh Yong Realty Co Ltd [1982] 1 LNS 69 FC ***(foll)***

Lee Wah Bank Ltd v Afro-Asia Shipping (Pte) Ltd [1992] 2 SLR 93 ***(refd)***

LYL Hooker Sdn Bhd v. Tevanaigam Savisthri KT Chitty & Anor [1987] 1 CLJ 356; [1987] CLJ (Rep) 179 SC ***(refd)***

Mari Boutique Sdn Bhd v. Jaya Jusco Stores Bhd [2003] 4 CLJ 848 HC ***(refd)***

Overseas Union Enterprise Ltd v. Three Sixty Degree Ltd [2013] 3 SLR 1 HC ***(dist)***

Seven Seas Industries Sdn Bhd v. Philips Electronic Supplies (M) Sdn Bhd & Anor [2008] 4 CLJ 217 CA ***(refd)***

Soong Ah Chow & Anor v. Lai Kok Cheng [1984] 1 CLJ 152; [1984] 1 CLJ (Rep) 360 FC ***((foll))***

Walford & Ors v. Miles & Another [1992] 2 AC 128 ***(refd)***

Wee Tiang Yap v. Chan Chan Brothers [1984] 1 CLJ 156; [1984] 1 CLJ (Rep) 433 FC ***(refd)***

Legislation referred to:

Civil Law Act 1956, s. 28(4)(a)

Civil Law Act [Sing], s. 19(4)

Other source(s) referred to:

Lewison, *The Interpretation of Contracts,* 2004 edn, p 185

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For the 2nd respondent - Rajendra Navaratnam & Sachpreetraj Singh Sohanpal; M/s Azman Davidson & Co

[Editor's note: Appeal from High Court, Kuala Lumpur; Civil Suit No: 22NCVC-245-02-2012 (affirmed in part).]

Reported by S Barathi

JUDGMENT

Vernon Ong Lam Kiat JCA

Introduction

[1] This is a landlord-tenant dispute involving three commercial properties. The plaintiff Perkasa is the landlord of a commercial building. The tenants Weatherford (first defendant) occupied portions of the 11th and 12th floors whilst Weatherford Solutions (second defendant) occupied the 14th floor.

[2] Perkasa's claim for double rental against the first and second defendants is premised on two causes of action: (i) that the defendants were holding over the premises pursuant to s. 28(4)(a) of the Civil Law Act 1956 (CLA 1956), and/or (ii) that the defendants were holding over in breach of the 'holding over' clauses under the tenancy agreements. Perkasa is also claiming for exemplary damages, loss of income, interest and costs. The first defendant counterclaimed for the refund of the deposits paid for the 11th and 12th floors tenancies respectively. The second defendant's counterclaim is for the refund of the deposit paid for the 14th floor tenancy.

[3] After a full trial, the High Court dismissed Perkasa's claims against the first and second defendants and allowed the first and second defendants' counterclaims for the refund of the deposits. Appeal No. 130 is Perkasa's appeal against the High Court's decision dismissing Perkasa's claim and allowing the first defendant's counterclaim. Appeal No. 661 is Perkasa's appeal against High Court decision allowing the second defendant's counterclaim.

[4] We heard the appeal on 2 April 2018 and handed down our decision on 13 April 2018. We allowed Perkasa's Appeal No. 130 in part. Perkasa's claim for double rental was allowed for the period calculated immediately after the expiry of the notice to quit up to the date of delivery of vacant possession of the premises by the defendants. Perkasa's appeals on the defendants' counterclaims were dismissed.

Salient Facts

[5] The learned trial judge at the High Court has comprehensively set out the facts leading to the dispute in his written judgment. For the purposes of this judgment, the salient facts are as follows:

(i) the 12th floor was originally tenanted by the second defendant under a tenancy agreement. The second defendant with Perkasa's consent vacated the 12th floor on 1 February 2008 after which the first defendant took over the premises in April 2008;

(ii) the 11th floor tenancy expired on 30 April 2009, the 12th floor tenancy on 31 March 2009 and the 14th floor tenancy expired on 31 March 2011;

(iii) the parties were at all material times involved in negotiations for fresh tenancies of their respective tenancies;

(iv) these negotiations had commenced on or before January 2009;

(v) negotiations having failed, *vide* letters dated 19 August 2011, Perkasa gave the defendants notices to terminate the 11th, 12th and 14th floors tenancies and to quit and deliver vacant possession on 1 October 2011;

(vi) by letters dated 26 August 2011, the defendants agreed to the termination of the tenancies but sought a fair and reasonable period to quit and deliver vacant possession of the premises to Perkasa; and

(vii) vacant possession of the premises was delivered to Perkasa on 31 October 2011.

Findings Of The High Court

[6] The learned judge made a number of key findings which included the following:

Issue 1: Claim For Double Rental Or Double Market Rent

(i) the legal background for the "failure to yield-up" clause under the tenancy agreements, clause was s. 28(4)(a) of CLA 1956 (SCC Lewison on *The Interpretation of Contracts* (2004 edn.) at p. 185; *BCCI v. Ali* [2002] 1 AC 251, at p. 269; *Basnol Abol & Ors v. The State Government of Sarawak & Other Appeals* [2004] 2 CLJ 553 FC; *HSBC Bank (M) Bhd v. Wui Ling Timber (Bintulu) Sdn Bhd & Anor* [2000] 8 CLJ 197, at p. 202);

(ii) Based on high authorities, it is a requirement under s. 28(4)(a) that there must be a wilful or contumacious holding over on the part of the tenant in order for the landlord to claim double rental or double the market rent (see *Krishna Sreedhara Panicka v. Chiam Soh Yong Realty Co Ltd* [1982] 1 LNS 69; [1983] 1 MLJ 65 (FC); *Soong Ah Chow & Anor v. Lai Kok Cheng* [1984] 1 CLJ 152; [1984] 1 CLJ (Rep) 360; [1986] 1 MLJ 42, at p. 43 (FC); *Mari Boutique Sdn Bhd v. Jaya Jusco Stores Bhd* [2003] 4 CLJ 848; [2004] 1 MLJ 74, at p. 82; *Wee Tiang Yap v. Chan Chan Brothers* [1984] 1 CLJ 156; [1984] 1 CLJ (Rep) 433; [1986] 1 MLJ 47 (FC); *Eight Development (M) Sdn Bhd v. Antara Steel Mills Sdn Bhd* [2004] 2 CLJ 32, at p. 45; *Lee Wah Bank Ltd v Afro-Asia Shipping (Pte) Ltd* [1992] 2 SLR 93 (SCA));

Issue 2: Whether The Defendants Were Holding Over The Premises Willfuly Or Contumaciously?

(iii) the second defendant's contractual rights and obligations under the 12th floor tenancy agreement was extinguished and discharged on 1 February 2008 when the second defendant vacated the 12th floor premises with Perkasa's consent;

(iv) the 12th floor was then let to the first defendant on a monthly tenancy from April 2008;

(v) Perkasa failed to establish that there was a novation or assignment of the 12th floor tenancy agreement by the second defendant to the first defendant;

(vi) as such, Perkasa's contractual claim against the first defendant, based as they are purportedly on the flawed premise that the 12th floor tenancy agreement was taken over by the first defendant must necessarily fail;

(vii) the one month notice to the first defendant to quit the 12th floor is unfair and unreasonable and thereby ineffective in law (see *JR Lincks Educational Consultants Sdn Bhd v. Goh & Sons Enterprise Sdn Bhd* [2008] 3 CLJ 815 (CA);

(viii) Perkasa's allegation of bad faith or *mala fides* on the part of the defendants in its negotiations with Perkasa is without merit as on the facts and on the law there is no contractual duty of good faith in respect of parties dealing at arm's length in respect of a commercial transaction (see *Interfoto Picture Library Ltd v. Stiletto Visual Programmes Ltd* [1989] QB 433, at p. 439; *Walford & Ors v. Miles & Another* [1992] 2 AC 128; *Aseambankers Malaysia Bhd & Ors v. Shencourt Sdn Bhd & Anor* [2014] 2 CLJ 773; [2014] 4 MLJ 619, at p. 666; *Seven Seas Industries Sdn Bhd v. Philips Electronic Supplies (M) Sdn Bhd & Anor* [2008] 4 CLJ 217; [2008] 5 MLJ 157);

(ix) Perkasa had after the expiry of the 11th, 12th and 14th floors tenancy agreements and prior to the issuance of the letters dated 19 August 2011, consented to the defendants continuing to occupy and remain in possession of the said floors, pending negotiations between the parties for fresh tenancies to be agreed;

(x) there was no evidence to support the allegation that the holding over of the 11th, 12th and 14th floors was willful or contumacious within the requirements of s. 28(4)(a) of the CLA 1956;

(xi) further, there was no evidence to show the defendants' refusal, neglect or refusal to yield up the premises. Instead, the evidence shows that the parties had intended for the defendants to stay on the premises pending conclusion of negotiations on the terms of the new tenancies, with no suggestions that the defendants were expected to vacate the premises on the expiry of the tenancies; and

Issue 3: Whether The Defendants Were Entitled To The Refund Of The Deposits Paid To Perkasa?

(xii) corollary to the dismissal of Perkasa's claims, all the deposits ought to be refunded to the defendants.

Submission Of Parties

[7] Learned counsel for Perkasa advanced the following arguments:

(i) the requirement of wilfulness or contumacy in respect of a claim for double rental under s. 28(4)(a) of the CLA 1956 is no longer applicable (see *Wee Tiang Yap*, *supra*; *Soong Ah Chow*, (*supra*)). The Federal Court in *Soong Ah Chow,* (*supra*) did not rely on that part of the decision in *Krishna Sreedhara Panicka* (*supra*) that decided that wilful or contumacious conduct was necessary;

(ii) the 'holding over' clauses relied upon in the three tenancy agreements does not require "wilful neglect or refusal to yield up the premises" before a claim for double rental may be made for holding over (see *Overseas Union Enterprise Ltd v. Three Sixty Degree Ltd* [2013] 3 SLR 1 (HC));

(iii) there was no abandonment of the right to double rental. Perkasa had in its correspondence continued to inform the defendants of, and repeated, its intention and right to claim double rental. No objections were registered by the defendants to the same;

(iv) the 12th floor was taken over by the first defendant from the second defendant about halfway through the period of the tenancy. There was a novation in law as the first defendant assumed responsibility of paying the rent pursuant to the 12th floor tenancy agreement (see *LYL Hooker Sdn Bhd v. Tevanaigam Savisthri KT Chitty & Anor* [1987] 1 CLJ 356; [1987] CLJ (Rep) 179; [1987] 2 MLJ 52 (SC); *Housing and Development Board v. Lee Sem Yoong Sdn Bhd* [1987] 1 LNS 30; [1987] 2 MLJ 204 (SC)); and

(v) in the alternative, even if the continued occupation of the 11th and 14th floors were on the basis of monthly tenancies or continued holding over without any wilfulness or contumacy, Perkasa was entitled to one month of double the monthly rental under each of the three tenancy agreements or one month of double rental for each of the premises in question. As such, a one month notice to quit would be sufficient in law.

[8] For the first defendant, learned counsel argued the following points:

(i) the negotiations failed because Perkasa unreasonably and without justification insisted on the rental rate of RM7.50 psf. The learned judge found that both parties had acted in their best commercial interests but the parties failed to come to commercial terms;

(ii) Perkasa's reservation of the right to claim for double rental is inconsequential and ineffective;

(iii) the defendants did not make any unequivocal admission to Perkasa's claim for double rental;

(iv) the words "failure to yield up" in the holding over clauses means a refusal to deliver up the premises with knowledge that the defendants have no right to remain in possession; and

(v) the learned judge correctly found that the first defendant did not take over the 12th floor tenancy from the second defendant. Instead, the first defendant became a monthly tenant of the 12th floor;

[9] Learned counsel of the second defendant submitted the following additional points:

(i) insofar as the claim under s. 28(4)(a) of the CLA 1956 is concerned, the learned judge (a) correctly found that the right to double rental is a matter of discretion for the court and it is conditional on wilful and contumacious holding over of the premises by the defendants, and (b) made a finding of fact that there no wilful and contumacious holding over of the 12th and 14th floors on the part of the second defendant;

(ii) the learned judge's finding that there was no failure to yield up the 12th and 14th floors under the tenancy agreements is a finding of fact;

(iii) it is also a finding of fact that the 12th floor tenancy agreement was discharged after the second defendant vacated the 12th floor premises and moved up to the 14th floor on 12 February 2008 with Perkasa's agreement and consent. As such the 12th floor tenancy agreement does not bind the second defendant;

(iv) at any rate, there was no contractual obligation as the tenancy agreement was never signed by the second defendant; and

(v) the reservation of right by Perkasa for a claim for double rental was contradictory with Perkasa's own conduct in allowing the defendants to stay on.

Decision

[10] On the factual matrix of this case, five principal issues must be determined in this appeal. The first is a question of law: whether s. 28(4)(a) of the CLA 1956 confers a discretion on the court in deciding whether to impose double rental. If so, whether there is a requirement in law to prove contumacious or wilful holding over on the part of the tenant in order for the landlord to recover double rental. The second is also a question of law: whether the "holding over" clauses under the tenancy agreements do not require 'wilful neglect or refusal to yield up the premises before a claim for double rental can be made for holding over. The third is a question of fact: whether the defendants were holding over the premises wilfully or contumaciously. The fourth issue relates to question of whether the notices to quit issued by Perkasa to the defendants are reasonable and valid. And the fifth issue is the question of whether the defendants' counterclaim for the refund of the deposits should be allowed.

[11] On the first issue, Perkasa's main thrust is that the requirement of wilfulness or contumacy imposed by the Federal Court in *Krishna Sreedhara Panicka* (*supra*) is no longer applicable in the light of the Federal Court's decision in *Wee Tiang Yap* (*supra*). The learned judge had addressed this legal point comprehensively in the light of the authorities (see paras. [38] to [54] of his written judgment). In our considered view, Perkasa's argument is without merit. The learned judge had correctly observed at paras. [46] to [49] that the pronouncements of the majority of the Federal Court in *Krishna Sreedhara Panicka* (*supra*) were consistently adhered to in *Wee Tiang Yap* (*supra*). Even if Wan Suleiman FJ may have had reservations about the correctness of the majority judgment in *Krishna Sreedhara Panicka* (*supra*), as to the requirement of a wilful or contumacious holding over, it cannot be denied that Wan Suleiman FJ actually applied the majority judgment in *Krishna Sreedhara Panicka* (*supra*) to the facts in *Wee Tiang Yap* (*supra*). We would also note that Wan Suleiman FJ's judgment in *Wee Tiang Yap* (*supra*) was not the judgment of the Federal Court as the other panel members, namely, George Seah FJ and Hashim Yeop Sani FJ delivered separate judgments. Although both George Seah and Hashim Yeop Sani FJJ concurred with Wan Suleiman FJ's conclusion that the appeal should be allowed, neither George Seah FJ nor Hashim Yeop Sani FJ expressed any view on the effect of s. 28(4)(a) of the CLA 1956 or the majority judgment in *Krishna Sreedhara Panicka* (*supra*). In fact, soon after *Wee Tiang Yap* (*supra*) was decided, Hashim Yeop Sani FJ delivered the judgment of the Federal Court in *Soong Ah Chow* (*supra*) which referred to and applied the majority judgment in *Krishna Sreedhara Panicka* (*supra*). Even if there is a conflict in the decisions of the Federal Court in *Krishna Sreedhara Panicka* (*supra*) and *Wee Tiang Yap* (*supra*), it is clear that the Federal Court in *Soong Ah Chow* (*supra*) applied and followed the majority judgment in *Krishna Sreedhara Panicka* (*supra*). As such, this court is bound to apply the later Federal Court decision in *Soong Ah Chow* (*supra*) (see *Dalip Bhagwan Singh v. PP* [1997] 4 CLJ 645; [1998] 1 MLJ 1 (FC) at p. 14).

[12] The learned judge held quite rightly that s. 28(4)(a) of the CLA 1956 being a penal provision must necessarily be construed with some degree of stricture; such that the courts must be vested with some discretion when to impose double rental. In this connection, it is also significant to note that the learned judge also considered the Singapore position under s. 28(4) of the Singapore Civil Law Act (Revised Edition 1999) (formerly s. 19(4) of the Singapore Civil Law Act (Cap 43, 1988 Ed)) which is in *pari materia* with our s. 28(4)(a) of the CLA 1956. Section 19(4) of the Singapore Civil Law Act was considered in *Lee Wah Bank* (*supra*) by the Singapore Court of Appeal

which held that the expression "holding over" requires an intention on the part of the tenant to refuse to deliver up the premises with knowledge that he has no right to remain in possession. We therefore agree with the learned judge's finding that it is a requirement under s. 28(4)(a) of the CLA 1956 that there must be a wilful or contumacious holding over on the part of the tenant in order for the landlord to claim double rental.

[13] The second issue relates to a claim for double rental under contract. The "holding over" clauses in respect of the 11th and 12 floors tenancy agreements are ss. 8.42 and 8.43 whereas in respect of the 14th floor tenancy agreement are cls. 7.44 and 7.47. In essence the provisions are similar and for convenience, ss. 8.42 and 8.43 are reproduced below:

> **Section 8.42 Yield Up**
>
> At the expiration or earlier determination (howsoever occurring) of the tenancy hereby created, *to peaceably and quietly yield up the Demised Premises* to the Landlord in accordance with the terms, conditions and covenants herein.
>
> **Section 8.43 Failure to Yield Up**
>
> Without prejudice to any other right the Landlord may have against the Tenant, if the Tenant upon the expiration or earlier determination of the tenancy hereby created *fails, neglects and/or refuses to yield up and vacate the Demised Premises in accordance with Section 8.42* hereof, to pay to the landlord as agreed liquidated damages *a sum equivalent to double the amount of Monthly Rental or double the rental of the Demised Premises at the prevailing market rate*, whichever shall be higher from the date of expiration or earlier determination of the tenancy hereby created to the date of actual delivery of vacant possession to the Landlord. (emphasis added)

[14] The 'holding over" clauses relate to: (i) the tenant holding over after the expiry of the tenancy: and (ii) the agreed liquidated damages which are computed on the basis of double rental. Seen in this light, the context and legal background for the 'holding over' clauses is quite obvious. It is premised on s. 28(4)(a) of the CLA 1956, and in particular, the analogous remedy of double rental for holding over a tenancy. Therefore, the legal background against which the tenancy agreement was made may influence the interpretation of the tenancy agreement, in particular, the "holding over" clauses. We say this because parties do not enter into contracts in a vacuum. They always negotiate against the background of the law. As such, it is reasonable to suppose that they take into account the general law in reaching their final agreement. Accordingly, the proper interpretation of the contract is properly influenced by the legal background against which it is made (Lewison on *The Interpretation of Contracts* (2004 edn.) at p 185; *Basnol* (*supra*); *Wui Ling Timber* (*supra*)). As such, the principles on the interpretation of

s. 28(4)(a) of the CLA 1956 would also apply to the interpretation of the "holding over" clauses. It follows that the requirement to show wilful or contumacious holding over by the defendant must be proved to enable Perkasa to claim for double rental for holding over.

[15] *Overseas Union Enterprise Ltd* (*supra*) cited by learned counsel for Perkasa is distinguishable on the facts and on the law. In that case, OUE rented the 39th floor of its hotel under a lease to the defendant. The public gained access to the 39th floor only through an open internal staircase from the 38th floor. This design created difficulties for the defendant when it applied for a fire safety certificate. As a result, the defendant subsequently abandoned its fire safety certificate application and its plan to operate its business on level 39. Despite this, the defendant retained possession of level 39 but failed to pay to OUE any of the sums due under the lease. OUE exercised its right of re-entry, terminated the lease and demanded vacant possession of level 39. When the defendant failed to comply, OUE sued for possession of level 39, payment in arrears, double rent for holding over and damages. One of the issues related to the question of whether cl. 16.4 of the lease under which OUE claimed for double rental and service charge is a penalty clause; and if so, it is void and unenforceable. The Singapore High Court found that cl. 16.4 is not a penalty clause and that OUE was entitled to recover the double rental. This case is clearly distinguishable as the defendant not only remained in possession but refused to pay any of the sums under the lease even though the defendant had decided not to operate the business at level 39. There was wilful and contumacious holding over by the defendant in that case. Further, the question in that case was whether cl. 16.4 was a penalty clause; it did not relate to the interpretation of that clause in the legal background of s. 28(4)(a) of the CLA 1956.

[16] The third issue relates to the learned judge's finding of fact that there was no evidence to support Perkasa's assertion that the defendants were holding over the premises wilfully or contumaciously. As this relates to a finding of fact by a trial judge after a full trial, it falls upon this court to determine whether or not the trial court had arrived at its decision or finding correctly on the basis of the relevant law and/or the established evidence. In so doing, this court is entitled to examine the process of evaluation of the evidence by the trial court. The requirement for the trial judge to have made a decision which was 'plainly wrong' before an appellate court may intervene is well settled in our appellate jurisprudence and practice. This strict requirement underscores the rationale that the appellate court should not reverse or disturb the trial judge's finding even if the appellate court is of the view that it would not have arrived at the same conclusion as the trial judge did on the evidence on the record before it.

[17] A plainly wrong decision occurs when it can be shown that there is insufficient judicial appreciation of evidence by the trial court; the requisite or correct standard to be applied is that no reasonable judge, on the evidence on record, could have reached the conclusion of the trial judge. The adverb 'plainly' does not refer to the degree of confidence felt by the appellate court that it would have reached the same conclusion as the trial judge. It does not matter, with whatever degree of certainty that the appellate court considered that it would have reached a different conclusion. What matters is whether the decision under appeal is one that no reasonable judge could have reached.

[18] Whilst the aforesaid principles are well settled, it may be appropriate to consider some instances where a decision may be described as perverse such that the judgment cannot be explained or justified by the special advantage enjoyed by the trial judge by reason of having seen and heard the witnesses testify and being tested before him. Some instances demonstrative of such occasions on the part of the trial judge include the following. It should be noted, however, that the following instances are not meant to be exhaustive.

(i) misdirected itself on the evidence;

(ii) failed to judicially appreciate the evidence;

(iii) failed to consider any material evidence;

(iv) acted on some irrelevant evidence so as to render the decision wholly erroneous;

(v) made wrong inference from facts;

(vi) misapprehended the facts; or

(vii) gave reasons which are unsatisfactory or contradictory of each other.

[19] We have perused the learned judge's written judgment and are satisfied that the learned judge have carefully considered the totality of the evidence and arrived at his findings on the basis of his evaluation of the relevant evidence. He had given his reasons for his findings and for rejecting Perkasa's interpretation of the facts. We do not see any misdirection on the evidence. In short, we do not think that the learned judge's findings of fact were plainly wrong. Accordingly, the learned judge's finding that there was no evidence to prove wilful or contumacious holding over by the defendants is affirmed.

[20] In relation to the fourth issue on the validity of the notices to quit, we are of the view that after the expiry of the fixed term of the respective tenancies, the defendants became in law and in fact monthly tenants of the premises they occupied. We do not think that the notices to quit are unreasonable. As such, we would allow Perkasa's claim for double rental in respect of the 11th, 12th and 14th floors calculated from the period commencing immediately after the expiry of the notices to quit up to the date of the delivery of vacant possession of the premises by the defendants.

[21] As a result of our aforesaid findings, it follows that the defendants' counterclaim should be allowed. Perkasa's appeal on the counterclaim is dismissed.

Conclusion

[22] For the foregoing reasons, Perkasa's Appeal No 130 is allowed in part. The appeals on the counterclaim are dismissed. Appeal No 661 is therefore dismissed. Further, as invited by the learned judge in his written judgment, we hereby vary the judgment in respect of the counterclaim by awarding judgment interest on the first defendant's counterclaim. The order of the High Court on costs is affirmed. We further order that costs on the appeals be borne by the parties respectively.